promotional communications and are anticompetitive. And here also, it is the Hospital that is seeking refuge in rigid categories so that it never needs to assert a legitimate and plausible procompetitive justification for the information restraints.

Finally, the string of cases the Hospital cites to support its claim that the rule of reason applies here are not relevant to any issue raised in the Petition. Hospital Opposition, pp. 16-17. First, only one of the cases cited by the Hospital addresses the application of the quick look doctrine: *Lie v. St. Joseph Hospital*, 946 F.2d 567 (6th Cir. 1992). *Lie*, which was decided long before this Court's decision in *California Dental*, did not involve an information restraint, but rather the suspension of the plaintiff's privileges because of quality of care concerns. Further, the court in *Lie* simply treated the quick look doctrine as part of the rule of reason.

CONCLUSION

This case presents important antitrust issues – that antitrust analysis is driven by economic impact, not labels; that bans on truthful comparative information almost always impair competition; and that a restraint on potential competitors is just as pernicious as a restraint among existing competitors. As the Department of Justice and Federal Trade Commission recently explained, fundamental antitrust principles have not been uniformly applied in healthcare, to the great detriment of consumers. *Improving Health Care,* Report by The Federal Trade Commission and the Department of Justice (September, 2004). Further, by expanding immunity in direct contradiction of the statutory language, the Third Circuit's opinion will eviscerate private enforcement of those important principles and may prevent the Court from soon having other opportunities to address these issues. Consequently – not only

for the Petitioners here, but for the medical community at large represented by the *amici* – it is vitally important that the Court take this case and give direction to the courts of appeals.

Respectfully submitted,

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ALAN D. GORDON, M.D.; ALAN D. GORDON, M.D., P.C., A CORPORATION; MIFFLIN COUNTY COMMUNITY SURGICAL CENTER, INC., A CORPORATION,

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF FOR THE AMERICAN ASSOCIATION OF AMBULATORY SURGERY CENTERS AND THE OUTPATIENT OPHTHALMIC SURGERY SOCIETY IN SUPPORT OF THE PETITION

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MOTION OF THE AMERICAN ASSOCIATION OF AMBULATORY SURGERY CENTERS AND THE OUTPATIENT OPHTHALMIC SURGERY SOCIETY FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

Pursuant to Rule 37 of the Rules of this Court, the American Association of Ambulatory Surgery Centers ("AAASC") and the Outpatient Ophthalmic Surgery Society ("OOSS") request leave to file the accompanying brief as *amici curiae* in support of the petition for writ of certiorari.[1]

[1] Petitioner Mifflin County Community Surgery Center, which is a member of the *amici* organizations AAASC and OOSS, has provided financial support to *amici* to partially defray the cost of this brief, but neither it nor its counsel have otherwise participated in its preparation.

AAASC is one of the premier national non-profit professional associations dedicated to promoting the high quality, lower-cost, patient-centered care provided through ambulatory surgery centers ("ASCs"). AAASC has over 500 members comprising over 1500 ASC locations across the country; these members include individual centers, corporate members, professional organizations, and state associations. ASCs compete with hospitals and frequently provide outpatient surgical procedures at substantially lower cost.

OOSS is the leading ophthalmic ASC non-profit professional society, with membership of roughly 1000 ophthalmic surgeons who offer care through over 200 ophthalmic ASCs nationwide. OOSS's mission is to help ASC owners and ophthalmic surgeons utilizing ASCs to provide high quality, cost-effective surgical care through education, information, and advocacy. Ophthalmic ASCs compete directly with hospitals to provide surgical services related to cataracts, glaucoma, and refractive or vitreoretinal care. They serve as a competitive check on hospitals with respect to cost, standards of care, and patient satisfaction.

As a representative of ASCs, and the physicians who practice in them, *amici* have a vital interest in ensuring that ASCs can continue to provide convenient and patient-friendly alternatives to hospital care. Because ASCs offer many benefits that customers and payors desire, they have become increasingly popular in the past decade, often at the expense of hospital outpatient facilities that compete with ASCs for patient and government funds. At the same time, ASCs depend on hospitals due to federal and state laws requiring ASC physicians to have privileges at nearby hospitals. ASCs are often especially vulnerable in local areas where a single hospital has a strong market position. Thus, ASCs are placed in the challenging position of competing with the very same

hospitals on which they often must rely to become licensed and stay in business.

The Third Circuit's decision leaves ASCs, and the physicians who practice in them, especially vulnerable in two situations: (1) when the physicians face "peer review" performed at a hospital; and (2) in their first stages of operation, when they are still nascent. The court's analysis of both of these questions left ASCs and their related physicians more exposed than ever to anticompetitive behavior from a hospital. Thus, amici seek permission to submit this brief to address these two points of the Third Circuit's opinion.

First, ASC physicians must be able to practice without fearing inappropriate reprisals through the physician peer review process. The Health Care Quality and Improvements Act ("HCQIA") provides protection from antitrust damage suits in legitimate peer review situations. However, it also provides exceptions from that immunity for certain potentially anticompetitive behavior. The Third Circuit applied overly broad immunity to hospitals tasked with performing peer review, in a manner that effectively expunged the exceptions for potential antitrust violations from the statute. If uncorrected, the Third Circuit's decision would allow hospitals and others to engage in *exactly* the type of unchecked behavior that Congress intended its exceptions to prevent. This Court should grant certiorari in order to give effect to the plain language of the statute.

Additionally, *amici* seek recognition that ASCs are not required to open their doors before the antitrust laws properly may be applied to shield them against anticompetitive behavior. Despite the fact that the Petitioner in this case had applied for a Certificate of Need to open an ASC, and had taken further steps in pursuit of its license, the Third Circuit determined that Petitioner and Lewistown Hospital which also offered

outpatient care services "were not competitors in the relevant market" and that Petitioner's "competition in the facility services market did not commence until MCCSC opened more than one year later." App. at 41. Such a result conflicts with antitrust cases and principles which recognize that competition in its incipiency is actual competition in the market. Moreover, this result leaves ASCs particularly vulnerable where they either enter a market where a hospital is already entrenched or where their physicians must rely on hospitals for privileges without which ASCs cannot operate under federal or state law. *Amici* support the issuance of a writ of certiorari on this issue to settle this question, as the Third Circuit's erroneous decision contradicts both accepted case law and antitrust analysis.

Accordingly, *amici* respectfully request that their motion for leave to file the accompanying brief as *amici curiae* be granted to address these issues.[2]

Respectfully submitted,

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March 13, 2006

[2] Petitioners have consented to the filing of this *amicus brief*; Respondent Lewistown Hospital has not.

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BRIEF FOR THE AMERICAN ASSOCIATION OF AMBULATORY SURGERY CENTERS AND THE OUTPATIENT OPHTHALMIC SURGERY SOCIETY IN SUPPORT OF THE PETITION

INTEREST OF *AMICI CURIAE*

The American Association of Ambulatory Surgery Centers ("AAASC") and the Outpatient Ophthalmic Surgery Society ("OOSS") request leave to file the attached brief *amici curiae* in support of the petition for writ of certiorari.

Amici are leading professional organizations dedicated to providing high-quality, lower-cost health care through ambulatory surgery centers ("ASCs"). ASCs compete with hospitals in providing outpatient surgical services, and regularly offer these services at substantially reduced costs to patients, private payors, and the government via Medicare and Medicaid. The opening of an ASC will

often result in decreased charges and/or improved standards of care for outpatient surgery at nearby hospitals.[1]

Amici have a strong interest in ensuring that physicians active in the formation or operation of ASCs do not lose their hospital privileges for anticompetitive reasons via restraints masquerading as professional review actions. Specifically, they have an interest in assuring that the federal statute affording qualified immunity from antitrust damage claims for legitimate peer review activity in hospitals is not improperly extended to restraints directed at physicians' competitive acts – restraints outside the scope of statutory immunity by the plain text of the law. They also seek recognition that the antitrust laws protect them against a hospital's anticompetitive acts when they are perhaps most vulnerable, when they are just embarking upon operation. ASCs should be protected from hospitals' anticompetitive actions as soon as they have taken concrete steps toward opening or providing services through an ASC that make them potential or incipient competitors of hospitals, whether or not their doors have yet opened for business.

SUMMARY OF ARGUMENT

Over the last decade, ASCs have become an important source of competition to hospitals for outpatient surgical services. By offering convenient, high-quality, lower-cost options for patients and physicians, ASCs provide an

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[1] Testimony of David Shapiro, M.D., President, AAASC, before the Subcomm. on Health, Comm. on Ways & Means, U.S. House of Representatives regarding the Medicare Payment Advisory Comm'n Report on Medicare Payment Policies for Ambulatory Surgery Center Services. at 2 (Mar. 20, 2003) [hereinafter "Shapiro Testimony"], *available at* http://www.aaasc.org/advocacy/documents/AAASCTestimony2003.pdf.

important alternative to hospital care. At the same time, ASCs and the physicians who staff them are dependent on hospitals for staff privileges without which many cannot operate under federal and state law. This dependence could be abused by hospitals to quash the threat of additional ASC competition.

A physician's peer review action is one potential vehicle for such abuse. The Health Care Quality and Improvement Act, 42 U.S.C. §§ 11101-11152 (1986) ("HCQIA" or "the Act") is designed to set standards for immunity from treble antitrust damages for certain physician peer review actions. Because the statutory language clearly requires satisfaction of a two-part test to confirm that a review was (1) not based on a doctor's competitive behavior, which would fall outside the definition of a "peer review action"; and (2) reasonable, it was error for the Third Circuit to subsume the first test into the reasonableness inquiry of the second. This can only result in an improper broadening of the intended immunity.

The Third Circuit also misapplied applicable precedent in stating that a still nascent ASC could not have been a competitor of an existing hospital. Antitrust law recognizes that potential or incipient competition will often act as a check on the marketplace. ASCs need legal protection from anticompetitive conduct even before they open their doors.

REASONS FOR GRANTING THE PETITION

I. This Court Should Examine The Third Circuit's Rewriting Of The Test For HCQIA Immunity.

A. ASCs Provide Vital, Innovative, Lower-Cost Health Care Services That Merit Federal Protection From Anticompetitive Conduct.

ASCs play an increasingly important role in the provision of quality health care at reasonable cost to patients